1-16-2014

State v. Pressley Appellant's Brief Dckt. 40868

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. TIMOTHY THYS PRESSLEY, Defendant-Appellant.	NO. 40868 ADA COUNTY NO. CR 2012-13214 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Timothy Pressley was charged with aggravated battery allegedly committed by threatening to do violence by releasing a pit bull breed dog at the alleged victim. The jury was instructed that if they found either that Mr. Pressley threated the victim or by attempting to commit a violent injury upon the victim, the jury must find him guilty of aggravated assault. Because the jury was instructed on a means of committing the crime that Mr. Pressley was not put on notice that he would have to defend against, there was a fatal variance in the jury instructions. Furthermore, the existence of the variance was not harmless and this Court should vacate Mr. Pressley's conviction.

Statement of the Facts and Course of Proceedings

The State charged Mr. Pressley by Information with committing felony aggravated assault and with misdemeanor battery. (R., pp.26-27.) Specifically, the State alleged that Mr. Pressley committed the crime by,

> intentionally, unlawfully and with apparent ability threaten by word and/or act to do violence upon the person of Jeffrey Brekke, by means likely to produce great bodily harm, to wit: by releasing a pit bull bread dog at Jeffrey Brekke, which created a well-founded fear in Jeffrey Brekke that such violence was imminent.

(R., p.27.) The case proceeded to trial. (R., pp.48-51.) After the evidence was presented and without objection from the defense, the district court instructed the jury on the definition of the crime of assault as follows:

> An "assault" is committed when a person:
>
> (1) unlawfully attempts, with apparent ability, to commit a violent injury on the person of another; or

(2) intentionally and unlawfully threatens by word or act to do violence to the person of another, with apparent ability to do so, and does some act which creates a well-founded fear in the other person that such violence is imminent.

(R., p.79.) Next, the jury was instructed,

In order for the defendant to be convicted of the offense charged in Count I, the State must prove each of the following:

(1) On or about September 6, 2012,

(2) in the State of Idaho,

(3) the defendant, Timothy Thys Pressley, committed an assault upon Jeffrey Brekke,

(4) by releasing a pit bull bread dog at Jeffrey Brekke,

(5) the defendant committed the assault by any means or force likely to produce great bodily harm.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(R., p.80.) The jury found Mr. Pressley guilty of both aggravated assault and misdemeanor battery.[1] (R., pp.102-103.) The district court sentenced Mr Pressley to a unified term of five years, with two and one-half years fixed. (R., pp.105-109.) Mr. Pressley filed a timely Notice of Appeal. (R., pp.113-116.)

[1] In the interests of brevity and clarity, the facts presented at trial will be discussed in more detail in section (C)(3) below.

ISSUE

Was Mr. Pressley denied his right to a fair trial by the district court's erroneous instructions allowing the jury to convict Mr. Pressley of criminal conduct he was not charged with committing?

ARGUMENT

Mr. Pressley Was Denied His Right To A Fair Trial By The District Court's Erroneous Instructions Allowing The Jury To Convict Mr. Pressley Of Criminal Conduct He Was Not Charged With Committing

A. Introduction

Mr. Pressley was charged with aggravated battery by threatening to commit serious bodily harm. The jury was instructed that they must convict Mr. Pressely of aggravated battery if they *either* found that he threatened serious bodily harm *or* if they found that he attempted to actually cause serious bodily harm. Thus, there exists a variance between the crime actually charged and the crimes he actually had to defend against. Furthermore, because Mr. Pressley was actually harmed by the variance between the information and jury instructions, the variance was fatal and this Court should vacate his conviction.

B. Relevant Jurisprudence

The existence of an impermissible variance is a question of law over which an appellate Court exercises free review. *State v. Day*, 154 Idaho 476, 479 (Ct. App. 2009) (citing *State v. Alvarez*, 138 Idaho 747, 750 (Ct .App. 2003); *State v. Sherrod*, 131 Idaho 56, 57 (Ct. App. 1998).) "A variance may occur where there is a difference between the allegations in the charging instrument and the proof adduced at trial *or where there is a disparity between the allegations in the charging instrument and the jury instructions.*" *Id.* (citing *State v. Montoya*, 140 Idaho 160, 165 (Ct. App. 2004) (emphasis added).) A variance is fatal if it amounts to a constructive amendment, which occurs if the charging document is changed "to the extent the defendant is tried for a crime of a greater degree or a different nature." *Id.* (citing *State v. Jones*, 140 Idaho 41, 49 (Ct. App. 2003); *State v. Colwell*, 124 Idaho 560, 566 (Ct. App. 1993).) Where a statute defines

various means of committing a crime, a valid conviction can only be based upon proof beyond a reasonable doubt that the defendant committed the crime through the actual means charged, rather than through means which exist in the statute but were not alleged in the charging document. *See State v. Folk*, 151 Idaho 327, 340 (2011).

C. Mr. Pressley Was Deprived His Right To A Fair Trial Due To A Fatal Variance In The Jury Instructions

Mr. Pressley did not object to the jury instructions in the present case. However, he asserts that his claim of a fatal variance can be raised for the first time on appeal under the doctrine of fundamental error. In order to obtain relief on appeal under a claim of fundamental error the appellant must show the following three things: (1) the defendant must demonstrate one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate there is a reasonable possibility that the error affected the outcome of the trial. *State v. Perry*, 150 Idaho 209, 226 (2010).

1. The District Court's Jury Instructions Contain A Variance From The Information Which Deprived Mr. Pressley Of His Constitutional Right To A Fair Trial

A fatal variance is a due process violation and, thus, affects a defendant's unwaived, Fourteenth Amendment right to a fair trial. *See De Jonge v. Oregon*, 299 U.S. 353, 362 (1937), *State v. Chapa*, 127 Idaho 786, 790 (Ct. App. 1995). In the present case, the jury instructions allowed Mr. Pressley to be convicted of committing criminal activity he was not charged with committing.

Idaho Code § 18-901 defines two different ways of committing the crime of "assault" as follows:

> An assault is:
>
> (a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or
>
> (b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

I.C § 18-901. A defendant thus commits an assault if he either *attempts* to commit a violent injury on another (i.e., attempts to commit battery), or *threatens* to do violence to another.

Mr. Pressley was charged with committing assault by threatening to do harm to Mr. Brekke by,

> intentionally, unlawfully and with apparent ability threaten by word and/or act to do violence upon the person of Jeffrey Brekke, by means likely to produce great bodily harm, to wit: by releasing a pit bull bread dog at Jeffrey Brekke, which created a well-founded fear in Jeffrey Brekke that such violence was imminent.

(R., p.27.) He was not alleged to have committed the assault through the alternate means of actually attempting to harm Mr. Brekke. (R., p.27.)

The jury instructions, however, required the jury to find Mr Pressley guilty if they found *either* that he threatened to harm Mr. Brekke as charged in the Information, *or* if he attempted to harm Mr. Brekke which was not charged in the Information. The district court provided the jury with the following definition of the crime of assault:

> An "assault" is committed when a person:
>
> (1) unlawfully attempts, with apparent ability, to commit a violent injury on the person of another; or

(2) intentionally and unlawfully threatens by word or act to do violence to the person of another, with apparent ability to do so, and does some act which creates a well-founded fear in the other person that such violence is imminent.

(R., p.79.) Next, the jury was instructed,

In order for the defendant to be convicted of the offense charged in Count I, the State must prove each of the following:

(1) On or about September 6, 2012,

(2) in the State of Idaho,

(3) the defendant, Timothy Thys Pressley, *committed an assault upon Jeffrey Brekke,*

(4) by releasing a pit bull bread dog at Jeffrey Brekke,

(5) the defendant committed the assault by any means or force likely to produce great bodily harm.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(R., p.80 (emphasis added).) The jury instructions informed the jury that they must find Mr. Pressley guilty if they found (among other elements) that he committed an "assault" on Mr. Brekke. They were provided a definition of "assault" which stated the crime occurs either when the defendant "threatens" to harm the victim (as charged), or when the defendant "attempts" to harm the victim (not charged). Thus, there exists a variance due to a disparity in the language contained in the Information and the language contained in the jury instructions. *See State v. Folk*, 151 Idaho 327 (2011); *State v. Day*, 154 Idaho 476, 479 (Ct. App. 2013).

2. The Error Is Plain On Its Face

The law is clear that the instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed

the crime charged, and that if they do not, there can be a fatal variance between the jury instructions and the charging document. *State v. Folk*, 151 Idaho 327, 342 (2011). The jury instruction is in the record, so there is no need for additional information outside the record to determine whether an error occurred.

Furthermore, there is no evidence that the failure to object to the instruction was a strategic decision. Mr. Pressley gained absolutely no strategic advantage by allowing the jury to convict him of uncharged conduct. There is nothing in the record to indicate that defense counsel recognized the error in the jury instructions but chose not to object for any strategic reasons. The Information (which was created and filed by the prosecutor), and the jury instructions (which were created and filed by the district court), were available not only to Mr. Pressley but to the prosecutor and the district court as well. There is simply no reason to believe that counsel for Mr. Pressley recognized the variance but did not object to it, while the prosecutor and the district court did not see the problem at all. This Court should not speculate to the contrary and should find the error plain on its face. *See State v. Day*, 154 Idaho 476, 481 (Ct. App. 2013); *State v. Sutton*, 151 Idaho 161 (Ct App. 2011).

3. The Variance Is Fatal And, Thus, Is Not Harmless

Although Mr. Pressley generally denied that he released the dog at all, the instructions requiring the jury to find Mr. Pressley guilty if they found that he committed an assault by attempting to injure Mr. Brekke, coupled with the evidence presented and the arguments made by the prosecutor, embarrassed Mr. Pressley in his defense and was therefore fatal. Had the jury been properly instructed, there is a reasonable probability that Mr. Pressley would have been found not guilty.

In his opening statement, the prosecutor told the jury, "[y]ou will learn ... that on September 6th, 2012, Jeffrey Brekke got a different image of a dog. A dog used as a weapon. The dog released to attack him and *attempt to hurt him* ... A dog that was *released to attack* by this man, the defendant, Tim Pressley." (Tr., p.91, Ls.8-18 (emphasis added).) The prosecutor further argued that the evidence would show that after Mr. Pressley released the dog and after Mr. Brekke was able to subdue the dog, Mr. Pressley punched Mr. Brekke in the face and, "[t]he evidence and testimony you will see today will show that *Mr. Pressley became the dog's partner in crime.*" (Tr., p.94, L.12 - p.95, L.20 (emphasis added).) The prosecutor continued, "I will ask you to return a verdict reflecting that this defendant committed an aggravated assault against Mr. Brekke by releasing his pit bull at him *and having him attacked.*" (Tr., p.96, L.22 - p.97, L.1 (emphasis added).)

Mr. Brekke testified that he was the general manager at Travel Centers of America in Boise and that he was working on September 6, 2012 where he encountered Mr. Pressley, his two traveling companions, and their three dogs, who were sitting outside on the grounds of the travel center. (Tr., p.98, L.1 - p.104, L.19.) Mr. Brekke approached the three and confronted them about a report that they were involved in some sort of altercation, and he told them that there could be no further problems or they would be told to leave. (Tr., p.106, L.9 - p.107, L.6.) Mr. Brekke was told that they were planning on leaving in the next 10 or 15 minutes, Mr. Brekke went back to work inside the store. (Tr., p.107, Ls.6-13.) Later, Mr. Brekke was informed by a customer that someone was talking loudly and drinking on the premises, and Mr. Brekke went outside to tell Mr. Pressley and his companions to leave. (Tr., p.107, L.23 - p.108, L.12.)

Having seen a bottle of whiskey sitting near the three, he told them to leave and they became boisterous and belligerent. (Tr., p.108, L.13 - p.109, L.5.) Two of the dogs barked at Mr. Brekke but he was not too concerned about them, and he told Mr. Pressley and his companions to control their dogs. (Tr., p.110, Ls.6-16.) Mr. Brekke continued,

> The other dogs continued to circle around me barking, continued asking the gentlemen to control their animals. They made no move to do so. I hear the pit bull becoming vocal. I look up, he's straining at the leash. Very low guttural growls, barks, lunging forward. I look at Mr. Pressley at this time. He raises the lead in his hand and opens his hand and the pit bull charges me.

(Tr., p.111, Ls.2-11.) Mr. Brekke then described his struggle with the pit bull including the dog "lunging, jumping, and snapping his jaws" trying to bite him, that the dog actually bit him at his side, and that he felt he was in danger of physical harm. (Tr., p.112, L.4 - p.113, L.2.) After Mr. Brekke restrained the dog, Mr. Pressley ran toward him and punched him in the face. (Tr., p.113, L.3 - p.115, L.25.) The prosecutor also asked Mr. Brekke if Mr. Pressley ever made an effort to stop the attack, control the dog, or apologize afterword, and Mr. Brekke testified that Mr. Pressley did none of those things. (Tr., p.148, L.18 - p.149, L.3.)

Melvin Savage was fueling his vehicle at the travel center when he heard a commotion, looked up, and saw a dog charge Mr. Brekke. (Tr., p.153, L.1 - p.157, L.3.) He testified that Mr. Pressley made no effort to restrain the dog, or call the dog off. (Tr., p.159, Ls.10-16.) He further testified that after Mr. Brekke subdued the dog, Mr. Pressley punched him in the face. (Tr., p.160, Ls.1-23.) Mr. Savage did not hear Mr. Pressley apologize and he did not remember if Mr. Pressley ultimately restrained the dog. (Tr., p.160, L.17 - p.161, L.9.)

Officer Samuel Nesbitt of the Boise Police Department responded to the scene. (Tr., p.167, L.14 - p.171, L.17.) When he arrived, the pit bull was tied up to a backpack with a makeshift leash but it was able to pull towards the officer and jumped on his leg and started to nip at him. (Tr., p.174, L.11 - p.175, L.25.) Officer Nesbitt was able to get away from the dog but testified that, had he not been able to, he would have shot the animal. (Tr., p.175, L.24 - p.177, L.5.)

Mr. Pressley testified on his own behalf. (Tr., p.198, Ls.1-13.) He testified that Roxie, the dog that jumped on Mr. Brekke, belonged to one of his traveling companions and that none of the three were holding Roxie's leash when Mr. Brekke confronted them and the dog jumped on him. (Tr., p.202, L.4 - p.206, L.21.) Mr. Pressley admitted that he overreacted, stating that believed Mr. Brekke was hurting Roxie so he punched him in an attempt to protect the dog. (Tr., p.211, L.4 - p.212, L.3.) On cross-examination, the prosecutor asked Mr. Pressley if he ever tried to call Roxie back or try to grab his leash, to which he replied he did not. (Tr., p.220, L.11 - p.222, L.1.) He also was asked whether he could have grabbed Roxie's leash, to which he replied that he could. (Tr., p.221, Ls.2-7.) On re-direct, Mr. Pressley testified that Roxie would not have responded to his verbal command to stop even if he had done so. (Tr., p.225, Ls.1-16.)

During closing arguments, the prosecutor stated, "[t]his dog was an actual weapon, a weapon that was released by this defendant to *do physical and painful harm on Jeff Brekke*." (Tr. Closing, p.14, Ls.16-18.) The prosecutor told the jury that there was two ways to commit an assault including "[u]nlawful attempt with apparent ability to commit a violent injury upon the person of another" and that the evidence showed that Mr. Pressley did that by releasing the dog "in an effort to attack him." (Tr. Closing, p.15, Ls.7-19.) The prosecutor then argued that there was evidence to support a conviction

under the theory that Mr. Pressley threatened Mr. Brekke and stated, "[m]embers of the jury, the evidence has shown you, we have it both ways." (Tr. Closing, p.15, L.24 - p.16, L.15.) The prosecutor told the jury that after the dog started attacking Mr. Brekke, Mr. Pressley did not try to help him; rather, he hit him and, "[t]he dog didn't do what he wanted it to do, so he was going to finish the job himself." (Tr. Closing, p.21, Ls.12-19.) The prosecutor argued that the jury could infer Mr. Pressley's "intent from inaction," arguing that his failure to stop the attacked demonstrated that he intended the attack to occur. (Tr. Closing, p.22, L.17 - p.23, L.5.) Additionally, the prosecutor argued,

> Members of the jury, on September 12 — or September 6, this defendant released the dog he knew was dangerous, he knew was volatile, and at the time on September 6th he knew that dog was acting in an aggressive, mean-spirited manner.
>
> It was a pure weapon, and he released that dog. He let that dog go, and he let that [dog] attack Jeff Brekke, *and he did nothing to stop it.*

(Tr. Closing, p.24, Ls.14-21 (emphasis added).)

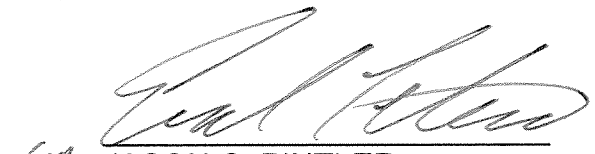
The State presented evidence that Mr. Pressley released the dog, and that he did so not just to scare Mr. Brekke, but to actually attack him. Mr. Pressley testified that he did not release the dog at all but he acknowledged that did not try to stop the dog and he punched Mr. Brekke once the dog was subdued. The State presented additional evidence, through the testimony of Mr. Brekke and Mr. Savage, that Mr. Pressley did not try to stop the attack once it had begun. The prosecutor argued to the jury that they could find that Mr. Pressley committed the aggravated assault either if they found that he threatened Mr. Brekke, or if they found that he actually attacked Mr. Brekke, and then argued evidence that he failed to stop the dog's attack and his punching Mr. Brekke in the face showed that he used the dog as a weapon.

Mr. Pressley asserts that the variance in this case is fatal as there is a reasonable probability that the jury convicted him of having committed the aggravated assault by actually attacking Mr. Brekke, i.e., attempting to batter him, and not by merely threatening to do so. The jury could have concluded that Mr. Pressley did not actually threaten Mr. Brekke while holding the leash, or even that he ever held the leash at all as Mr. Pressley testified, but that his failure to attempt to stop the dog either by grabbing the leash or by calling her off demonstrated that he, as the prosecutor repeatedly asserted, used the dog as a weapon. Had the jury been properly instructed, there is a reasonable probability that he would not have been convicted of aggravate assault and the variance was fatal. Therefore, Mr. Pressley asserts that this Court must vacate his conviction.

CONCLUSION

Mr. Pressley requests that this Court vacate his judgment of conviction and remand his case to the district court for further proceedings.

DATED this 16th day of January, 2014.



for JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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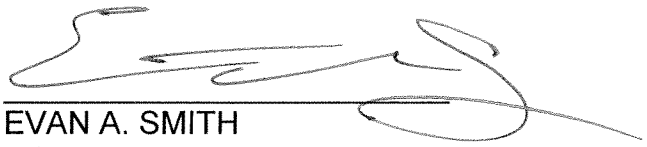

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